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8 LENSRAFTERS, INC. and EYEXAM OF  
9 CALIFORNIA, INC.

**ORIGINAL  
FILED**

MAY 31 2007

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

10  
11 IN THE UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 **C 07 2853** **EMC**  
Case No.:

14 LENSRAFTERS, INC.; and EYEXAM OF  
15 CALIFORNIA, INC.;  
16 Plaintiffs,

17 v.

18 LIBERTY MUTUAL FIRE INSURANCE  
19 COMPANY; EXECUTIVE RISK SPECIALTY  
20 INSURANCE COMPANY; UNITED STATES  
21 FIRE INSURANCE COMPANY; MARKEL  
22 AMERICAN INSURANCE COMPANY; and  
WESTCHESTER FIRE INSURANCE  
COMPANY,

23 Defendants.

**COMPLAINT FOR  
DECLARATORY RELIEF**

**DEMAND FOR JURY TRIAL**

24  
25 Plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. (together,  
26 "LensCrafters") allege as follows:

27 **INTRODUCTION**

28 1. Defendants are insurers that sold LensCrafters primary, umbrella and/or

1 excess insurance policies, the material terms of which are described below. Those policies  
2 contain a duty to indemnify LensCrafters. The duty to indemnify includes the obligation to  
3 fund a reasonable settlement.

4       2. This action arises out of defendants' refusal and failure to indemnify  
5 LensCrafters with respect to a putative class action lawsuit captioned *Melvin Gene Snow, et*  
6 *al. v. LensCrafters, Inc., et al.*, San Francisco Superior Court Case No. CGC-02-40554 (the  
7 "*Snow Action*"). In 2004, LensCrafters brought an action against Liberty Mutual in the  
8 Northern District of California, Case No. C 04-1001 SBA, concerning insurance coverage  
9 for the *Snow Action*. In that prior action, this Court found that two of LensCrafters'  
10 insurers had a duty to defend the *Snow Action*. The prior coverage action did not resolve  
11 the question of the insurers' duty to indemnify.

12       3. After several years of litigation in the *Snow Action*, the parties are presently  
13 involved in negotiations and mediation sessions through which they are trying to reach a  
14 settlement. The parties have made significant progress and have agreed to schedule one  
15 more mediation session, at which they are hopeful that a settlement will be finalized.  
16 LensCrafters has requested that defendants agree to fund any settlement, in accordance with  
17 the terms of their respective insurance policies. Presently, defendants have not agreed to  
18 indemnify LensCrafters or to fund a settlement. The defendants' failure and refusal to  
19 acknowledge their indemnity obligation and agree to fund a settlement threatens the ability  
20 of LensCrafters to resolve the *Snow Action*.

21       4. There is a present, active controversy between LensCrafters and its defendant  
22 insurers concerning the insurers' duty to indemnify LensCrafters for any settlement of the  
23 *Snow Action*, and a dispute among the defendants themselves as to which insurer(s) must  
24 indemnify. Therefore, LensCrafters brings this action for a declaration of the rights, duties  
25 and responsibilities of the parties under defendants' insurance policies.

## 26 THE PARTIES

27       5. Plaintiff LensCrafters, Inc. is an Ohio corporation with its principal place of  
28 business in Ohio.

6. Plaintiff EYEXAM of California, Inc., fka EyeMed, Inc. ("EYEXAM") is a California corporation with its principal place of business in California.

7. LensCrafters is informed and believes, and thereon alleges, that defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") is a Massachusetts corporation with its principal place of business in Massachusetts.

8. LensCrafters is informed and believes, and thereon alleges, that defendant Executive Risk Specialty Insurance Company ("ERSIC") is a Connecticut corporation with its principal place of business in Connecticut.

9. LensCrafters is informed and believes, and thereon alleges, that defendant United States Fire Insurance Company ("U.S. Fire") is a Delaware corporation with its principal place of business in New Jersey.

10. LensCrafters is informed and believes, and thereon alleges, that defendant Markel American Insurance Company ("Markel") is a Virginia corporation with its principal place of business in Wisconsin.

11. LensCrafters is informed and believes, and thereon alleges, that defendant Westchester Fire Insurance Company ("Westchester") is a New York corporation with its principal place of business in New York.

### **JURISDICTION**

12. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 2201. There is complete diversity of citizenship between LensCrafters and defendants, and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs. An actual controversy within the meaning of 28 U.S.C. § 2201 exists between the parties.

13. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391, because the alleged events and/or omissions giving rise to this Complaint are alleged to have occurred in this District.

### **FACTUAL ALLEGATIONS**

14. Each of the defendants issued one or more policies of insurance to LensCrafters, the material terms of which are alleged below. The policies are not being

1 attached to this Complaint because of their bulk and because it would be wasteful and  
2 burdensome for the Court and the parties.

3 15. LensCrafters has complied with all terms and conditions precedent of  
4 defendants' policies and is entitled to the benefit of insurance provided by them.

5 **The Liberty Mutual Policies**

6 16. Liberty Mutual issued to LensCrafters the following Commercial General  
7 Liability policies (collectively, the "Liberty Mutual Policies"):

- 8 • Policy No. TB2-681-004130-038, effective February 1, 1998 to February 1,  
9 1999;
- 10 • Policy No. RG2-681-004130-039, effective February 1, 1999 to February 1,  
11 2000;
- 12 • Policy No. RG2-681-004130-030, effective February 1, 2000 to February 1,  
13 2001;
- 14 • Policy No. RG2-681-004130-031, effective February 1, 2001 to February 1,  
15 2002;
- 16 • Policy No. RG2-681-004130-032, effective February 1, 2002 to February 1,  
17 2003;
- 18 • Policy No. RG2-681-004130-033, effective February 1, 2003 to February 1,  
19 2004;
- 20 • Policy No. RG2-681-004130-034, effective February 1, 2004 to February 1,  
21 2005;
- 22 • Policy No. RG2-681-004130-035, effective February 1, 2005 to February 1,  
23 2006.

24 17. LensCrafters, Inc. and EYEXAM are each a named insured under the Liberty  
25 Mutual Policies. The Liberty Mutual Policies provide, *inter alia*, that Liberty Mutual "will  
26 pay those sums that [LensCrafters] becomes legally obligated to pay as damages" because  
27 of "personal injury." The term "personal injury" is defined to include "injury. . . arising out  
28 of . . . [the] [o]ral or written publication of material that violates a person's right of

1 privacy.” Each of the Liberty Mutual Policies has limits of liability for personal injury of  
 2 \$3 million for each occurrence and \$6 million in the aggregate.

### 3 **The ERSIC Policy**

4 18. ERSIC issued a Managed Care Organization Errors and Omissions Liability  
 5 policy, Policy No. 8167-2076, effective November 12, 2001 to November 12, 2002 (the  
 6 “ERSIC Policy”), which provides coverage to EYEXAM and LensCrafters, Inc.

7 19. The ERSIC Policy provides coverage for “any Loss which the Insured is  
 8 legally obligated to pay as a result of any Claim. . . .” The term “Loss” is defined to include  
 9 “any monetary amount which an Insured is legally obligated to pay as a result of a Claim.”  
 10 The term “Claim” is defined as “any written notice received by any Insured that a person or  
 11 entity intends to hold an Insured responsible for a Wrongful Act.” The term “Wrongful  
 12 Act” is defined, *inter alia*, to mean “any actual or alleged act, error or omission in the  
 13 performance of, or any failure to perform, Medical Information Protection by any Insured  
 14 Entity or by any Insured Person acting within the scope of his or her duties or capacity as  
 15 such . . . .” The term “Medical Information Protection” is defined as “maintaining the  
 16 confidentiality of information regarding Medical Services and limiting the release or use of  
 17 such information in conformance with requirements of law.” The ERSIC Policy has limits  
 18 of liability of \$3 million for each Claim or Related Claims and \$3 million in the aggregate.

### 19 **The U.S. Fire Policies**

20 20. U.S. Fire issued to LensCrafters the following Commercial Umbrella Policies  
 21 (collectively, the “U.S. Fire Policies”):

- 22 • Policy No. 553-058755-2, effective February 1, 1998 to February 1, 1999;
- 23 • Policy No. 553-068740-7, effective February 1, 1999 to February 1, 2000;
- 24 • Policy No. 553-076092-8, effective February 1, 2000 to February 1, 2001.

25 LensCrafters, Inc., is a named insured under the U.S. Fire Policies.

26 21. The U.S. Fire Policies provide that U.S. Fire “will pay on behalf of the  
 27 ‘Insured’ those sums in the excess of the ‘Retained Limit’ which the ‘Insured’ by reason of  
 28 liability imposed by law . . . shall become legally obligated to pay as damages for: ‘Personal

1 Injury' caused by an 'Occurrence' committed during the Policy Period." The term  
2 "Personal Injury" is defined as "oral, written, televised, videotaped or electronic publication  
3 of material that violates a person's right of privacy." Each of the U.S. Fire Policies has  
4 limits of liability for personal injury coverage of \$25 million in excess of the retained limit  
5 for each occurrence and in the aggregate.

6 **The Markel Policy**

7 22. Markel issued to LensCrafters a Commercial Umbrella Liability Policy,  
8 Policy No. CU-GA-1345-01, effective February 1, 2001 to February 1, 2002 (the "Markel  
9 Policy"). LensCrafters, Inc. and EYEXAM are each a named insured under the Markel  
10 Policy.

11 23. The Markel Policy provides coverage, pursuant to Endorsement No. 4, for  
12 "Personal Injury" to the same extent such insurance is provided by "a policy listed in the  
13 Schedule of Underlying Insurance, and then only to the extent provided by such policy or  
14 policies." The Schedule of Underlying Insurance lists "Liberty Mutual Ins. Policy No. RG2  
15 681001430030 [sic] 02/01/01 to 02/01/02." The Markel Policy has limits of liability for  
16 personal injury coverage of \$15 million per occurrence and in the aggregate in excess of the  
17 limits of the underlying insurance.

18 **The Westchester Policies**

19 24. Westchester issued to LensCrafters an Excess Umbrella Policy, Policy No.  
20 MEA-675648, effective February 1, 2001 to February 1, 2002 (the "Westchester Excess  
21 Policy"). The Westchester Excess Policy is excess to the Markel Policy, follows form to  
22 that policy in terms of its coverage and the named insureds, and provides coverage for "that  
23 amount of loss which exceeds the amount of loss payable by [the Markel Policy]." The  
24 Westchester Excess Policy has limits of \$10 million per occurrence and in the aggregate in  
25 excess of the Markel Policy.

26 25. Westchester also issued to LensCrafters the following Commercial Umbrella  
27 Policies (collectively the "Westchester Umbrella Policies"):

- 28
  - Policy No. CUA-150963, effective February 1, 2002 to February 1, 2003;



- Policy No. CUA-706488, effective February 1, 2003 to February 1, 2004;
- Policy No. CUW-774410, effective February 1, 2004 to February 1, 2005;
- Policy No. CUW-785695, effective February 1, 2005 to February 1, 2006.

LensCrafters, Inc. and EYEXAM are each a named insured under the Westchester Umbrella Policies.

26. The Westchester Umbrella Policies provide that Westchester “will pay on behalf of the ‘Insured’ those sums in the excess of the ‘Retained Limit’ which the ‘Insured’ by reason of liability imposed by law . . . shall become legally obligated to pay as damages for: ‘Personal Injury’ arising out of an ‘Occurrence’” during the policy period. The term “personal injury” is defined to include injury arising out of “oral or written publication of material that violates a person’s right of privacy . . . .” Each of the Westchester Umbrella Policies has limits of liability for personal injury of \$25 million in excess of the retained limit per occurrence and in the aggregate.

#### **Defense and Settlement of the *Snow* Action**

27. The *Snow* Action was originally filed against LensCrafters, Inc. and other entities on March 12, 2002 on behalf of a putative class. The Second Amended Complaint (“SAC”), which is the current operative complaint, was filed on or about April 15, 2003. At present, the two defendants in the *Snow* Action are LensCrafters, Inc. and EYEXAM.

28. Among other things, the SAC alleges that LensCrafters disclosed private medical information of the putative plaintiff class, in violation of the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56 *et seq.*, thus violating the privacy rights of the putative plaintiff class. The purported disclosures of private medical information is alleged to have occurred during the periods of defendants’ policies described in this Complaint.

29. LensCrafters gave timely notice of the *Snow* Action to defendants. LensCrafters also requested that Liberty Mutual and ERSIC defend the *Snow* Action. These insurers agreed to pay defense costs under a reservation of rights. After payment of certain

1 defense costs, however, both insurers then contended that they had no further duty to  
2 defend.

3 30. On March 11, 2004, LensCrafters brought an action against Liberty Mutual in  
4 the Northern District of California, Case No. C 04-1001 SBA, for breach of contract and  
5 declaratory relief regarding Liberty Mutual's duty to defend and indemnify LensCrafters  
6 (the "Coverage Action"). On July 26, 2004, LensCrafters amended the complaint to add  
7 ERSIC as a defendant. In the course of the Coverage Action, the parties filed cross-motions  
8 for summary judgment regarding Liberty Mutual's and ERSIC's respective obligations to  
9 defend LensCrafters.

10 31. The Court, in an Order dated January 20, 2005, held that both Liberty Mutual  
11 and ERSIC had a duty to defend LensCrafters with respect to the *Snow* Action. The Court  
12 further held that the allegations in the *Snow* Action regarding disclosures of private medical  
13 information constituted "publication[s] of material that violate[] a person's right of privacy"  
14 as covered by the policies.

15 32. By stipulation of the parties, LensCrafters' claims for indemnity alleged in the  
16 Coverage Action were dismissed without prejudice on grounds that they were unripe for  
17 adjudication at that time. The Stipulation and Order dismissing the indemnity claims  
18 provided that any party to the stipulation could file a new action to adjudicate the dismissed  
19 claims, that such action must be filed in the Federal District Court for the Northern District  
20 of California, and that the parties to the stipulation consented to exclusive jurisdiction and  
21 venue of such an action in this Court.

22 33. On November 22, 2005, the Court entered an Amended Judgment in the  
23 Coverage Action in favor of LensCrafters and against Liberty Mutual and ERSIC regarding  
24 the duty to defend. Liberty Mutual has appealed from that judgment, and that appeal is  
25 currently pending before the Ninth Circuit.

26 34. The parties to the *Snow* Action are presently involved in settlement  
27 discussions and mediation sessions in which they are trying to settle the action. The parties  
28 have made significant progress and have agreed to schedule one more mediation session, at



1 which they are hopeful that a settlement will be reached. LensCrafters anticipates that a  
2 settlement may be reached for far less than its exposure in the *Snow* Action, and for less  
3 than the total limits of the defendant insurers' policies.

4 35. LensCrafters has requested that the defendant insurers agree to settle the *Snow*  
5 Action for an amount that is within their policy limits, and pay for the settlement under the  
6 indemnity provisions of their policies. Defendants have not agreed to fund the settlement.  
7 The defendant insurers have raised several purported coverage defenses and have taken  
8 contrary and conflicting positions about which of them must pay, about which policies must  
9 exhaust their limits of liability first, and about what their respective total limits of liability  
10 are for the *Snow* Action. Defendants' refusal to acknowledge their indemnity obligations  
11 and their duty to settle the *Snow* Action for an amount within policy limits, and their  
12 disputes about which insurers must pay and in what order, threatens the ability of  
13 Lenscrafters to achieve a settlement.

14 36. A present controversy exists with respect to defendants' obligations to  
15 indemnify LensCrafters, to settle the *Snow* Action, and to pay for a settlement in the *Snow*  
16 Action, and with respect to the parties' respective rights and obligations under the various  
17 insurance policies identified and described in this Complaint.

18 **FIRST CLAIM FOR RELIEF:**  
19 **DECLARATORY JUDGMENT RE DEFENDANTS' DUTY TO INDEMNIFY**

20 37. LensCrafters repeats and incorporates the allegations of paragraphs 1 through  
21 36.

22 38. Defendants have a duty under the terms of their respective insurance policies  
23 to indemnify LensCrafters in full for all legal liabilities they may incur in connection with  
24 the *Snow* Action. The duty to indemnify includes the duty to fund a reasonable settlement.

25 39. Defendants have each failed to honor and refused to accept their duty to  
26 indemnify LensCrafters by refusing to agree to settle and fund the settlement of the *Snow*  
27 Action. Accordingly, LensCrafters seeks a declaration of rights concerning the duties of  
28 each insurer, concerning the applicable limits of liability of each defendant's policy for the

1 *Snow* Action, and concerning which policies must pay and in what amounts. LensCrafters  
2 further seeks a declaration that defendants and each of them have an obligation under their  
3 respective policies to settle the *Snow* Action and indemnify LensCrafters for such  
4 settlement, or to pay all legal liabilities that LensCrafters may incur in the future as a  
5 consequence of the *Snow* Action should it not be settled now.

6 40. By reason of the foregoing, an actual and justiciable controversy presently  
7 exists between LensCrafters and defendants concerning their duty to indemnify  
8 LensCrafters on connection with the *Snow* Action.

9 WHEREFORE, LensCrafters requests this Court to enter a judgment as follows:

10 With respect to the First Claim for Relief,

11 a. a declaration that defendants have a duty under the terms and  
12 conditions of their policies to indemnify LensCrafters in full for all legal liabilities that may  
13 be incurred in connection with the *Snow* Action, and must fund any reasonable settlement of  
14 that action, subject only to the limits of liability set forth in the various policies; or if  
15 defendants fail to agree to and fund a reasonable settlement within policy limits, that they  
16 are liable for the full amount of any liability incurred by LensCrafters even if it exceeds  
17 their policy limits;

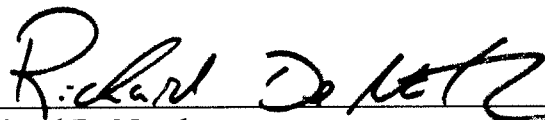
18 b. LensCrafters' costs of suit incurred herein; and

19 c. for such other, further, and/or different relief as the Court may deem  
20 just and proper.

21 DATED: May 31, 2007

HELLER EHRMAN LLP

23 By

  
Richard DeNatale

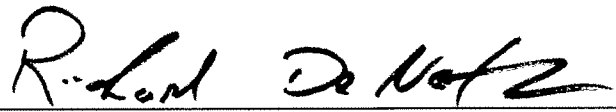
25 Attorneys for Plaintiffs  
26 LENS CRAFTERS, INC. and EYEXAM OF  
27 CALIFORNIA, INC.  
28

**DEMAND FOR JURY TRIAL**

Plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. hereby demand trial  
by jury.

DATED: May 31, 2007

HELLER EHRMAN LLP

By   
Richard DeNatale

Attorneys for Plaintiff  
LENSCRAFTERS, INC. and EYEXAM OF  
CALIFORNIA, INC.